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No.

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in the
Supreme Court
of the
United States

October Term, 1997

MICHAEL MOORE

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in finding that Petitioner's counsel was not ineffective for failing to appeal the incorrect base offense level of 38 which was given to the Petitioner?

II. Whether the Court of Appeals erred in finding that Petitioner's counsel was not ineffective for failing to appeal the denial of a downward reduction for the Petitioner's minimal participation in the conspiracy?

III. Whether the Court of Appeals erred in upholding the District Court's use of the 1993 guidelines in denying the Petitioner's original §2255 motion?

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The Petitioner, Michael Moore, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on September 17, 1997.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit entered on September 17, 1997, under the caption United States v. Moore, was not printed due to Fourth Circuit Rule 36. That determination is attached hereto in Appendix 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 17, 1997. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court

is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTES INVOLVED

21 U.S.C. 846 Conspiracy to Distribute and to Possess with Intent to Distribute Heroin and Fentanyl

United States Sentencing Guidelines, Section 2D1.1(b)(1) Specific Offense characteristics - If a dangerous weapon was possessed, increase by two levels.

18 USC 924(c) Use of a Deadly or Dangerous Weapon During and in Relation to any Crime of Violence or Drug Trafficking Crime.

STATEMENT OF THE CASE

In a superseding indictment returned by the Grand Jury for the District of Maryland on August 11, 1992, the Appellant and eight other individuals were charged with eight offenses. The Appellant herein, Michael Moore, was charged with the following offense: Count I - conspiracy to distribute and possession with intent to distribute heroin and fentanyl. The Appellant and all co-defendant's were convicted of this count.

The District Court then sentenced all nine defendants on June 14, 1993. Michael Moore received a sentence of 292 months imprisonment. All the defendant's then filed a joint appellate brief on September 16, 1994. Their appeal was argued before the Fourth Circuit Court of Appeals on March 10, 1995. On Appeal, numerous issues raised concerning the legality of the wiretaps involved, the joinder of the defendants at trial, and the sentencing of

the defendants. However, counsel for Mr. Moore only raised the issue of insufficient evidence with regard to Mr. Moore's conviction. On April 21, 1995, the Fourth Circuit Court of Appeals affirmed the convictions of all the defendants. Mr. Moore's Petition for Writ of Certiorari to the United States Supreme Court was also denied.

Mr. Moore then filed a §2255 motion with the District Court. In this motion Mr. Moore raised the issues of ineffective assistance of counsel for failing to challenge his base offense level of 38 and failing to raise on appeal the issue his denial of minor participant status. This motion was denied by the District Court. The Petitioner then filed an appeal of this decision with the Fourth Circuit Court, appealing the issues of ineffective assistance and the use of incorrect sentencing guidelines. The Fourth Circuit denied this appeal per curium, on September

17, 1997. It is this denial that the Petitioner is appealing.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit Court of Appeals erred when it found that Petitioner's counsel was effective even though he did not raise two meritorious issues on appeal. Further, the District Court erred when it used the 1993 Sentencing Guidelines in denying the Petitioner's original 2255 motion. Therefore, Petitioner's due process rights under the Fifth Amendment to the United States Constitution were violated when he was sentenced based upon the incorrect Guidelines; and the Petitioner's Sixth Amendment right to effective assistance of counsel was also denied.

I. **THE COURT OF APPEALS ERRED WHEN IT DID NOT FIND THAT APPELLANT'S COUNSEL WAS INEFFECTIVE ON APPEAL FOR FAILING TO CONTEST THE BASE OFFENSE LEVEL OF 38 THAT WAS ERRONEOUSLY USED TO SENTENCE THE APPELLANT.**

The Appellant contends that counsel

was ineffective on appeal for failing to object to the base offense level used in assessing a sentence for the Appellant. To establish a claim of ineffective assistance of counsel, the Appellant must show that counsel's performance fell below an objective standard of reasonableness and that such deficient performance prejudiced the Appellant. United States v. Hoyle, 33 F.3d 415, 418 (4th Cir. 1994)(citing Smith v. Smith, 931 F.2d 242, 24 (4th Cir. 1991)(citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). Prejudice is shown when, but for counsel's deficient performance, there is a reasonable probability that the results of the proceeding would have been different. Id. "A reasonable probability is one that is sufficient to undermine confidence in the outcome." Id. Furthermore, the Fourth Circuit has noted the importance of the sentencing phase of a trial entitling a defendant to effective representation.

United States v. Breckenridge, 93 F.3d 132, 135(4th Cir. 1996)(citing United States v. Iaquinta, 719 F.2d 83, 85-86 (4th Cir. 1983); United States v. Burkley, 511 F.2d 47, 51 (4th Cir. 1975)). Any sentence imposed without effective representation must be vacated and reimposed to permit facts in mitigation of punishment to be fully and freely developed. Id. "Failure of counsel to object to an improper application of the sentencing guidelines may amount to ineffective assistance of counsel. Id. Likewise, a criminal defendant's right to effective assistance of counsel continues through direct appeal. Evitts v. Lucey, 469 U.S. 337 (1985). Finally, such issues concerning ineffective assistance are properly raised pursuant to a 28 U.S.C. §2255 motion where the record is properly developed to allow for review of such claims. United States v. Stockstill, 26 F.3d 492, 498 (4th Cir. 1994).

In the instant case, the Appellant can satisfy the two-prong Strickland ineffective assistance test. The Appellant was convicted in this case of conspiracy to distribute heroin and fentanyl pursuant to 21 U.S.C. §846. Because serious injury and deaths were reportedly linked to the fentanyl distributions the Appellant was assessed at sentencing a base offense level of 38 pursuant to U.S.S.G. §2D1.1(a)(2).

However, the text of §2D1.1(a)(1) specifically indicates that a conviction under 21 U.S.C.§846 does not allow an automatic base offense level of 38. §2D1.1(a)(1) states that a base offense level of:

> (1) 38, if the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1),(b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.

The text and language of this particular Guideline are clear that only convictions under the specified statutes in conjunction

with death or serious bodily injury require a base offense level of 38. Importantly, at the sentencing hearing the judge admitted that his assessment of the 38 Base Offense Level for the 21 U.S.C. §846 conviction was based on an assumption that could very well be wrong, in which case he would be re-sentencing the defendants in a couple of years. The judge indicated that he was concerned with the absence of 21 U.S.C. §846 within U.S.S.G. §2D1.1(a)(2) but noted that the Court of Appeals would work out this issue. In fact, the Sentencing Judge noted that he was sure this issue was headed for the Court of Appeals. However, despite these inconsistencies in the Guidelines and the sentence imposed, in addition to the comments of the sentencing judge, no mention of this issue was raised on appeal. Appellate counsel failed to raise issues which were highlighted by the District Court as issues requiring the review of the

Court of Appeals. As such, counsel's conduct fell below that level needed to constitute objectively reasonable assistance. Reasonable counsel would have noted the judge's uncertainty in such a crucial area of sentencing and would have sought review in the Court of Appeals to ensure the correct treatment of his client.

Likewise, there is a reasonable probability that, but for counsel's errors the results of the proceeding would have been different. The text of the Guidelines omit any mention of 21 U.S.C. §846 convictions while listing various categories of other convictions. Furthermore, §2D1.1(a)(2) does not mention those who are sentenced under 21 U.S.C. §841(b)(1)(A), §841(b)(1)(B), or §846b(1)(C), but specifies only those convicted under those sections. Given this inclusion of certain statutes, the

exclusion of §846 evinces an intent to omit that section from the penalty provisions. Furthermore, there is a reasonable explanation to the omission of §846, other than Congressional Committee oversight. The heightened death or serious bodily harm penalties were only meant for those individuals convicted of actually distributing the fatal drug to the victim, not those individuals who were convicted upon the attendant conspiracy indirectly related to the drugs. These heightened penalties require a closer culpability than that possessed by simple co-conspirators who may have contributed just enough to be considered a part of the conspiracy, but not enough to be connected under §2D1.1(a)(2). Given this clear language, as well as the reasonable purpose behind the statute, 21 U.S.C. §846 should not be counted as one of the convictions requiring application of U.S.S.G. §2D1.1(a)(2).

Therefore, because counsel's conduct

fell below that needed to qualify as objectively reasonable conduct, in addition to the reasonably probability that but for counsel's errors the results of the proceeding would have been different, the Appellant was denied his Sixth Amendment right to effective assistance of counsel. As such, the Appellant's conviction should be vacated and remanded in order that proper Guidelines to be applied and a correct sentence to be imposed.

II. THE COURT OF APPEALS ERRED WHEN IT DID NOT FIND THAT APPELLANT'S COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE ON APPEAL THE DENIAL OF A REDUCTION FOR MINIMAL/MINOR PARTICIPATION IN THE DRUG CONSPIRACY.

The Appellant can also satisfy the two-prong Strickland ineffective assistance test for counsel's failure to appeal the denial of minor participation reduction in his base offense level.

Under §3B1.2 of the Sentencing Guidelines, a reduction in the offense level may be made for a minimal or minor participant in the conspiracy. A four-

level decrease is allowed for a minimal participant if that person is plainly among the least culpable of those involved in the conduct of the group. United States v. Reavis, 48 F.3d 763, 769 (4th Cir. 1995); U.S.S.G. §3B1.2, comment n.1. Although this adjustment should be used infrequently, a defendant's lack of understanding of the scope, structure, and activities of the conspiracy is indicative of a role as a minimal participant. Id. Furthermore, a defendant only is entitled to a reduction where his participation is extremely limited within the conspiracy, such as committing only one act in furtherance of the conspiracy. Id.

A reduction for minor participation is also allowed for those who are less culpable than most other participants, but whose role could not be described as minimal. Id.; U.S.S.G. §3B1.2. For those defendants who fall between the minor and minimal participation classification, a

three-point reduction in the Base Offense Level is appropriate. Id.

In the instant case, the Appellant was clearly a minor, if not minimal, participant in the drug conspiracy. As such, counsel was unreasonably deficient in failing to raise the reduction's denial on appeal. Although counsel argued the insufficiency of the evidence to support the Appellant's conviction, counsel failed to use that lack of evidence to show minimal participation on the part of the Appellant. The evidence at trial convicting the Appellant consisted solely of a limited number of phone calls in which the name Mike Moore was raised. However, instead of showing an active part in the conspiracy, these intercepted calls showed that the Appellant owed money to one of the other co-defendants. Furthermore, the evidence indicated that the Appellant was a buyer of drugs from the conspiracy and had no part in the planning, scope, structure,

or activities of the group. In fact, evidence at trial indicated one of the co-defendants was so irritated at the Appellant's repeated requests for drugs that he sought to have his telephone number changed. Further evidence indicated that the co-defendants did not want anything to do with the Appellant and would avoid taking his calls asking to purchase drugs.

This evidence indicates that the Appellant, although a buyer of drugs from the conspiracy, was not a full-fledged member of the group. The Appellant had no control over the group and was not involved in any planning or activities outside of purchasing drugs from the group. In fact, the Appellant had trouble even purchasing from the group as the drug conspirators wanted nothing to do with him. Given this evidence, the Appellant was only a minimal participant in the conspiracy -- if a member at all. Furthermore, even if not a minimal participant, the Appellant was at

the least a minor participant entitling him to a two-point departure or the three-point departure for in-between the minor and minimal categories.

Therefore, given the minimal role that the Appellant played in the conspiracy, counsel should have raised such issues on appeal. However, despite the strength of such an argument, no mention was made on appeal of the Appellant's status in the group. Given this failure, counsel's conduct falls below that standard of conduct needed to constitute effective assistance of counsel. As such the Appellant's was denied his right to effective representation in violation of the Sixth Amendment. The Appellant respectfully requests that his sentence be vacated so that the correct mitigating circumstances may be raised in assessing a new correct sentence of incarceration.

III. THE APPEALS COURT ERRED WHEN IT FOUND THAT THE DISTRICT COURT PROPERLY USED THE 1993 SENTENCING GUIDELINES IN DECIDING TO DENY THE APPELLANT'S §2255

MOTION.

"As a general rule, a defendant's sentence should be based upon the Guidelines "in effect on the date the defendant is sentenced"." United States v. Heater, 63 F.3d 311, 331 (4th Cir. 1995), quoting United States v. Hartzog, 983 F.2d 604, 608 (4th Cir. 1993). In the present case, this rule would mean that the Appellant was sentenced on June 14, 1993 and, therefore, the 1993 Guidelines should apply, which was what the Court used in denying the Appellant's §2255 motion.

However, there is an exception to this general rule. The conduct of the instant offense and the Appellant's indictment occurred in 1992. This Circuit has previously held "that amendments to the Guidelines occurring after a defendant's offense but before sentencing should not be applied if doing so would increase the sentence, because that would violate the Ex Post Facto clause in Article I, Sec. 9 of

the United States Constitution." Hartzog, at 331, cites omitted.

The Appellant was sentenced pursuant to U.S.S.G. §2D1.1. In the 1993 Sentencing Guidelines, the edition used by this court in denying the Appellant's §2255 motion, the crimes of Conspiracy and Attempt are included in this section. However, the 1992 edition of the Sentencing Guidelines do not contain this provision. Therefore, by relying on the 1993 Guidelines, this Court has improperly increased the Appellant's sentence and improperly denied his §2255 motion.

CONCLUSION

The Fourth Circuit in the instant case erred when it determined that the Petitioner's counsel had assisted him effectively, even though he failed to appeal two meritorious issues. Further, the Fourth Circuit and the District Court denied the Petitioner of his Due Process Rights when they used the 1993 Guidelines in the denial of his original 2255 motion .

Wherefore the Petitioner, Michael Moore respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

1 FOURTH CIRCUIT COURT OF APPEALS ORDER
September 17, 1997

2 SUPERSEDING INDICTMENT

3 FOURTH CIRCUIT COURT OF APPEALS ORDER
April 21, 1995